

1815327 (Migration) [2019] AATA 5190 (5 September 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1815327
MEMBER:	Hugh Sanderson
DATE:	5 September 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 155 (Five Year Resident Return) visa.

Statement made on 05 September 2019 at 3:09pm

CATCHWORDS

MIGRATION – cancellation – Return (Residence) (Class BB) visa – Subclass 155 (Five Year Resident Return) – ground for cancellation – incorrect information in Partner visa application – applicant's identity – previously entered Australia under a different identity – refused a Protection visa – resided in Australia as an unlawful non-citizen – consideration of discretion – relevance of incorrect information – deliberate provision of false information – genuine relationship – separation from spouse – decision under review affirmed

1.

LEGISLATION

*Migration Act 1958 (Cth), ss 101, 107, 109, 359AA, 359A
Migration Regulations 1994 (Cth), r 2.41*

CASES

MIAC v Khadgi (2010) 190 FCR 248

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 155 (Five Year Resident Return) visa under s.109(1) of the *Migration Act 1958* (the Act).
3. The delegate cancelled the visa on the basis that the applicant had provided incorrect answers in respect of her Partner visa application. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.

Background

4. The applicant is a citizen of China and is currently [age] years old. The applicant applied for a Partner visa on the basis of her claimed relationship with [Mr A]. In that application, the applicant responded to the following questions with the answers below:
 5. Q 6. Have you or any other person included in this application ever been refused an entry permit or visa to Australia?
 6. A. Yes applied for a visitor visa in 2002 and got refused.
 7. Q 10. Main applicant's full name.
 8. A. Family name: [Applicant's family name].
 9. Given names: [Applicant's given name]
 10. Q 14. Other names you are, or have been, known by (including name at birth, previous married names, aliases).
 11. A. N/A
 12. Q 16. Date of birth.
 13. A. [Date 1].
 14. Q 80. Have you, or any other person included in this application, ever been excluded from or asked to leave any country (including Australia)?
 15. A. No.
 16. Q 82. Which countries have you lived for 12 months (in total) or more during the last 10 years?
 17. A. (No answer given).
18. The applicant was granted a [temporary Partner] visa on 10 February 2006. She arrived in Australia [in] February 2006. She was granted a [permanent Partner] visa on 17 September 2007.
19. The NSW Road and Maritime Service (NSW RMS), using facial image comparison when the applicant applied for a driver's licence, identified the applicant as having used a previous identity. This showed the applicant had claimed to be [Alias 1] born on [Date 2].
20. Departmental records showed this person had entered Australia [in] November 2002 on a [Tourist] visa. She had applied for a Protection visa on 18 December 2002, which was refused by the Department. An application for a review of that decision was unsuccessful and the decision of the Department to refuse the application was affirmed. The Bridging visa which had been granted to [Alias 1] expired on 25 March 2003, but she remained in Australia as an unlawful non-citizen. After being located by the Department she was placed in immigration detention until 20 June 2003. She departed Australia [in] December 2004. She

was subject to a three-year exclusion period from the date of departing Australia due to unlawfully overstaying her visa.

21. On 9 June 2017 the applicant's agent filed with the Department a Form 1023 Notification of Incorrect Answers. In that document, the applicant acknowledged that she had previously been in Australia before the grant of her Partner visa and had used her cousin's name. She said that she had applied for a Protection visa and appealed that decision. She left Australia before the judicial review had been completed. She said that she provided the incorrect information because she "made a big mistake by using (her) cousin's name".
22. The Department wrote to the applicant on 12 April 2018 with a Notice of Intention to Consider Cancellation under s.109 of the Act. The Department set out the particulars of the incorrect information, including the information the applicant had provided in her Notification of Incorrect Answers and the reasons why the Department considered the answers incorrect. The applicant was invited to comment on or respond to this information.
23. The applicant responded, acknowledging that she had provided incorrect information. She said that when she was in Australia she used her cousin's passport and identity to enter Australia. She then met her husband in 2003. After returning to China she applied for the Partner visa using her true identity.
24. The applicant's agent argued the applicant's visa should not be cancelled for the following reasons:
 - The fact that the incorrect information was provided did not affect the assessment that the applicant and her husband were in a genuine relationship;
 - The applicant remains married to her husband and they are dedicated to each other;
 - The applicant is extremely regretful for having provided the false information but was desperate to be with her husband;
 - The applicant's daughter, who migrated to Australia with the applicant, is now married to an Australian permanent resident and they have two Australian citizen children;
 - The applicant provides significant support for her daughter and grandchildren;
 - The applicant advised the Department of her incorrect answers due to her fear and uncertainty about the mistake; and
 - Almost 12 years had elapsed since the incorrect information had been provided and the applicant has never been in trouble with the law over that period.
25. The delegate who considered the application found the applicant had provided false information in her Partner visa application. When considering whether the applicant's visa should be cancelled, the delegate noted the following:
 - The applicant had deliberately provided false information to the Department in her Partner visa application;
 - The applicant was subject to a three-year exclusion period and at the time of her application would have been refused the Partner visa regardless of whether she was in a genuine relationship with her sponsor or not;

- The applicant is now expressing regret for having intentionally provided false information;
 - The applicant has been living in Australia for the last 12 years and is in a continuing relationship with her sponsor;
 - There is nothing to prevent the sponsor from travelling to China to spend time with the applicant over any exclusion period the applicant would be subject to if her visa were cancelled;
 - The applicant only notified the Department of the incorrect information after she became aware that her facial image had been matched with her previous identity by NSW RMS;
 - Under her previous identity, the applicant had overstayed her [Tourist] visa from 25 March 2003 until she applied for a Protection visa on 20 June 2003;
 - The applicant was held in immigration detention from 12 June 2003 until 19 June 2003 and then departed Australia [in] December 2004;
 - No consequential cancellation will occur of the applicant's daughter's right to reside in Australia;
 - The applicant's daughter is currently [age] years of age and she has two young children who are Australian citizens; and
 - If the applicant's visa is cancelled, she will be subject to a three year restriction before she would be able to apply for another visa.
26. Taking all these matters into account, the delegate found the fact that the applicant had intentionally provided incorrect information outweighed the reasons not to cancel her visa. Accordingly, the delegate cancelled the applicant's Subclass 155 Return Resident visa.

Information to the Tribunal

27. The Tribunal wrote to the applicant on 26 June 2019 pursuant to s.359A of the Act, providing the information in respect of the reasons why the Department found the applicant had provided incorrect information. The applicant provided a response to this information on 9 July 2019.
28. The applicant appeared before the Tribunal on 3 September 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's husband and daughter. Friends of the applicant also attended the hearing to support the applicant and one made a statement at the end of the hearing.
29. The Tribunal commenced the hearing by explaining to the applicant the process under s.359AA of the Act. The Tribunal explained to the applicant it would be putting to her information which would be the reason, or a part of the reason, for affirming the decision under review. It would explain why this information was relevant and then invite the applicant to comment on or respond to the information. If she required more time, she could request an adjournment.

Evidence of the applicant

30. The applicant gave evidence as to her current situation in Australia. She is living with her husband in his home in [Suburb 1]. Her husband is still working as a [Occupation 1]. She said that she had worked for about two or three years as a [Occupation 2] but was not working at the moment as she did not have work rights. She said that she had also worked as a [Occupation 3] at a [Business 1]. Her daughter is living with her husband and her two children in [Suburb 2]. She said that her daughter returned to China for about a year as the applicant's mother was ill. Her daughter took her two children with her to China. She said she would speak to her daughter each day using WeChat. Her daughter also spent four months in China after the birth of her first child to stay with her grandmother.
31. The applicant said that she returns to China regularly to be able to spend time with her mother and father. She stays with them in their home. She said that she does not see her former husband when she returns to China and had not seen him since she came to Australia in 2002. She said that when she came to Australia in 2002 she left her daughter with her grandmother, which was why she has a close relationship with her. She was not aware of the amount of contact her daughter has with her father.
32. The Tribunal asked the applicant if she understood why the Department had found that she had provided false information in her Partner visa application. The applicant deflected these questions claiming that she did not have the correct understanding of the questions and she said that she had always been known by her true name, she did not realise that she had to disclose that she came to Australia and applied for a Protection visa using her cousin's identity documents.
33. The applicant said she first met her husband in June or July 2003 at a party and that a relationship started after then. She said that she only spent one night at her husband's home before she returned to Australia in 2006.
34. The Tribunal referred to the process under s.359AA of the Act set out above. The Tribunal referred to the statements provided by the applicant and the sponsor at the time of the Partner visa application. These set out a story that the parties had been introduced over the phone and the relationship developed as the sponsor would speak to the applicant over the phone, using her daughter as an interpreter to communicate with each other. This was relevant as it indicated both the applicant and the sponsor were providing false information to the Department as to the claimed development of their relationship. It indicated that the applicant was aware that she would need to provide a false narrative of the claimed relationship and that the answers she provided to the Department in the application were deliberately false and not as a result of any misunderstanding. The applicant was invited to comment on or respond to this information.
35. The applicant requested an adjournment. The Tribunal asked the applicant why she would require an adjournment. She said she needed time to think about what had been said. The Tribunal repeated the information and the explanation to the applicant as to the relevance of the information to ensure that she understood the relevance of the information. The applicant then said that she did not want to say anything about the information.
36. The Tribunal referred to an anonymous report given to the Department which alleged the applicant had paid her husband to marry her so that she could obtain permanent residence. It was alleged that the applicant had been working as a [Occupation 4], which was where she had met her husband and had previously been in Australia using another name. This was relevant as it indicated the applicant was not in a continuing relationship with the sponsor and indicated that the applicant had been unlawfully working in Australia as a [Occupation 4].

37. The applicant said that it was impossible for her to be in a contrived relationship with her husband as she had been in a relationship with him for 14 years. She said that when she had been in Australia previously she worked as a [Occupation 4] using the name of her cousin. She denied that she had met her husband while working as a [Occupation 4]. She said that she has sometimes worked as a [Occupation 3] in a [Business 2].
38. The applicant said that if she was required to return to China she would have great difficulties because her parents are now elderly and will probably pass away. She said that she has no other family in China. She said that she has four or five cousins who continue to live in China in the same town where her parents live.
39. The applicant said that she did not believe she had any outstanding debt to the Commonwealth.
40. The applicant said that the incorrect information in the Partner visa application was because she did not have good English. She said that she had no idea what she said would cause so many problems. She said that she loved Australia and her husband and wanted to remain living in Australia.

Evidence of the applicant's husband

41. The applicant's husband provided details of his life with the applicant in Australia. He said that he first met the applicant in June 2004 at a dance club about six months before she returned to China. He said that he did not know the basis on which the applicant was in Australia at that time and he only found out just before she returned to China. He said that she never told him about her Protection visa application but he did know that she had suffered abuse from her husband in China. He believed that the last time the applicant had any contact with her former husband was at her daughter's wedding in China.
42. The applicant's husband said that she had been working as a [Occupation 2] for about three years and also as a [Occupation 3] in a [Business 1]. He said that he did not know if it was a [Business 2] as he had never been there.
43. The applicant's husband gave details of the applicant's daughter's travel to China and the time she has spent with her grandparents there.
44. The Tribunal referred the applicant's husband to the statements given by him and the applicant in support of the Partner visa application. His statement was, in part, read to him. The Tribunal noted the narrative given in that statement was that he and the applicant first met each other by way of a telephone introduction with the applicant living in China, with her daughter, in 2004 and that they only met each other in person for the first time when he travelled to China. This indicated that both he and the applicant had conspired together to provide false information in support of the Partner visa application. This also indicated the applicant's failure to provide information about her previous time in Australia and the fact that she had used her cousin's identity was a deliberate action and not simply a mistake as she continues to claim.
45. The applicant's husband did not provide any clear response to this information but accepted that it appeared that the false information had been deliberately provided by himself and the applicant in the application.
46. The applicant's husband said that it would be devastating for him if the applicant were required to return to China. He said that he could not live over there due to his work commitments and he could not work in China. He said that the applicant spends much of her time now with her daughter and grandchildren. He said that he has not taken holidays for a

long time. He said that he has long service leave owing to him, together with about eight weeks of holiday leave. He said that his mother died recently, which affected him emotionally. He has a good relationship with his sisters.

Evidence of the applicant's daughter

47. The applicant's daughter said that she lives with her husband and two children in [Suburb 2]. She said she married her husband in 2013 and sponsored him for a Partner visa. She said that she had known her husband since school days.
48. The applicant's daughter confirmed the times that she had returned to China. She said that she spent extended time in China to be able to be with her grandmother. She said that when in China, she kept touch with her mother through WeChat. She said although that was alright, it was not as good as the applicant being able to be personally with her children. She said that her children spend a lot of time with the applicant.
49. The applicant's daughter said that if her mother were required to return to China her husband would be devastated as their relationship is genuine.
50. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

51. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
52. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
53. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

54. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.101 by the applicant failing to provide answers to all questions and providing incorrect answers. The details of the incorrect answers and failing to provide answers to questions are set out in paragraph 3 above.
55. In response to the allegation that the applicant has provided false information, the applicant's agent responded on 15 May 2018 stating the applicant accepted that her answers to questions 6, 14, 80 and 82 were incorrect.

56. In a written response provided by the applicant dated 9 July 2019 the applicant does not specifically acknowledge that she has provided incorrect answers, but claims that she “misunderstood the question”. She acknowledges that after she was refused a Visitor visa to enter Australia, she “then used (her) cousin’s name and passport to grant entry into Australia”.
57. The overwhelming evidence is that the applicant provided incorrect answers in her application and did not answer all questions so that information relevant to the application was not provided to the Department.
58. The facial recognition report issued by the NSW RMS showed that the applicant had previously been in Australia between 2002 and 2004 using a different name. The applicant provided a Notification of Incorrect Answers (Form 1023) advising the Department of the incorrect information provided in her application. In response to the Department’s notification, the applicant’s agent has acknowledged the applicant provided false information in her Partner visa application. At the hearing, the applicant acknowledged that information in her Partner visa application was not correct, although she claimed this was a misunderstanding. Whether there was any misunderstanding at that time by the applicant is discussed below.
59. The Tribunal finds that the applicant completed her application form in a way that incorrect answers were given when she failed to mention or provided false information that she had previously entered Australia under a different name and had resided in Australia for over two years and that she had been refused visas previously and that she had been excluded from or asked to leave Australia.
60. For these reasons, the Tribunal finds that there was non-compliance with s.101 of the Act by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

61. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
62. In exercising this power, the Tribunal must consider the applicant’s response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Migration Regulations 1994. Briefly, they are:
 - The correct information;
 - The content of the genuine document (if any);
 - Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document;
 - The circumstances in which the non-compliance occurred;
 - The present circumstances of the visa holder;
 - The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;

- Any other instances of non-compliance by the visa holder known to the Minister;
- The time that has elapsed since the non-compliance;
- Any breaches of the law since the non-compliance and the seriousness of those breaches; and
- Any contribution made by the holder to the community.

63. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

The correct information

64. The correct information was that the applicant had previously travelled to Australia and had used and been known by a different name. She also had been refused visa applications in Australia and had been excluded from or asked to leave Australia. She had lived in Australia for more than 12 months prior to the Partner visa application, and for part of this she was residing in Australia as an unlawful non-citizen.

Content of the genuine document

65. This consideration is not relevant to this case.

Relevance of the incorrect information on the decision to grant the visa

66. It was claimed that the parties were in a genuine relationship and that the failure to provide the information as to the applicant's previous time in Australia was not material to the grant of her Partner visa. The Tribunal does not accept this argument.

67. The assessment of whether the applicant would have been entitled to the grant of a Partner visa is not solely based on the requirement that the parties are in a genuine and continuing relationship. The Tribunal accepts that at the time of the application the parties were in a genuine and continuing relationship and they continue to be so at this time.

68. The applicant would have been required to pass a character test. The fact that she had previously entered Australia using bogus documents and a false name and had applied for a Protection visa which had been refused to her would have been relevant in any assessment of her character. The Department would have also been aware that there may be an outstanding debt to the Commonwealth. The applicant would have also been assessed against the special return criteria, which may have restricted whether she would have been able to make a successful Partner visa application within a specified period. These issues, regardless of whether the applicant and the sponsor were in a genuine relationship, would likely have meant that the Partner visa application that was filed by the applicant would have been refused.

69. The Tribunal finds that the decision to grant the visa was based, partly, on the incorrect information provided in the failure by the applicant to provide the correct information to the Department.

The circumstances in which the non-compliance occurred

70. The applicant claimed that she came to Australia using her cousin's passport and identity documents because she had been refused a Visitor visa using her own documents. She then applied for a Protection visa because she feared for her safety due to the conduct of her former husband in China. She was refused that Protection visa.
71. There is no plausible information that would indicate the applicant had any difficulties with her husband or any other person at any time in China. The Tribunal accepts her relationship with her first husband may have been dysfunctional, however, there is no credible information before the Tribunal that the applicant has suffered at any time, and certainly not after she returned to China in 2004, any violence from her former husband or there is any reason why she was not able to reside in China.
72. The applicant claimed, at various times, that it was just a misunderstanding that she did not provide the correct information in her application. She blamed her lack of ability in understanding the English language and in following the advice of people as to what she should say in the application. The Tribunal does not accept this.
73. Quite apart from the information in the application, the applicant and the sponsor provided a detailed history of the claimed relationship with each other. The claims made in those statements, which are consistent, are that they first started communicating with each other over the telephone in August 2004 with the sponsor telephoning the applicant in China and speaking to her in English with the assistance of her daughter as interpreter. It was only when the sponsor travelled to China in December 2004 that they met each other in person for the first time.
74. The evidence of the applicant and the sponsor is that these claims are all false. They claim to have met each other in person in June 2004 (although claims were made they met in 2003). Their relationship started after this time. Before the applicant returned to China, the sponsor was aware that the applicant had been using her cousin's passport and had been refused a Protection visa.
75. The Tribunal does not accept that the applicant failed to provide information that she had previously used her cousin's passport to enter Australia and remain living in Australia for a period of about two years, was due to any misunderstanding on the part of the applicant. The Tribunal finds her failure to provide this information to the Department was a deliberate act by her knowing that if she did provide this information it was likely she would not be granted a Partner visa. This failure to provide the information was done with the assistance and complicity of the sponsor, who was further willing to provide a false statement regarding the history of their claimed relationship.
76. The fact that the applicant has persisted in her claim that this was simply a misunderstanding indicates that she does not have any genuine regret for providing this false information. The fact that she claims that it was only a misunderstanding is an attempt by her to minimise the significance of her providing false information to the Department. Any regret she now may have is that by applying for a driver's licence, she was identified by the relevant authorities as having used an assumed identity previously, for which she would face repercussions. It is not that she has any regret about the fact that she provided this false information; any regrets she has relate simply to the fact that she has been discovered as having provided this false information and the repercussions that have flowed on from this.
77. The Tribunal finds that the circumstances in which the non-compliance occurred do not support not cancelling the visa.

Present circumstances of the visa holder

78. The visa holder remains living with her husband in his home in [Suburb 1]. She has only worked for about two or three years in Australia as a [Occupation 2]. She has worked at other times either as a [Occupation 3] in a [Business 1] or [Business 2] and as a [Occupation 4]. She claims not to have worked as a [Occupation 4] since she returned to Australia in 2006. She has a number of friends in Australia.
79. The applicant's daughter is married and sponsored her husband for a Partner visa. They have two children who are Australian citizens. The applicant's daughter has returned to China, with her children, for extended periods to live with her grandmother. Most recently, she spent nine months in China, returning in April 2019. She also spent a period of almost five months in China in 2015 immediately after the birth of her first child. The applicant was able to continue to keep in touch with her daughter over that period using WeChat. The applicant's parents continue to live in China, although they are elderly.
80. The Tribunal accepts the applicant is still in a spousal relationship with her sponsor. He works and is not financially dependent upon the applicant. He lives in a home he owns by himself. He has travelled to China on occasions with the applicant and stayed with her parents or in other friends' homes.
81. The applicant's husband said that he would be devastated if he were separated from the applicant. He said that he currently is owed long service leave from his employer together with about eight weeks' leave, although he was unsure about the extent of his leave entitlements. The applicant's husband's mother recently died. He has a good continuing relationship with his two sisters. As indicated above, the Tribunal finds that the applicant's husband was complicit in providing the false information to the Department when the Partner visa application was filed.
82. The Tribunal accepts that if the applicant's visa was cancelled her husband would continue to reside in Australia while she lived in China. This would cause significant financial and emotional hardship for both the applicant and her husband. Although the husband has sufficient holiday leave owing to him to be able to spend some time in China with the applicant before any further Partner visa application could be filed, it would only be limited. This must be given some weight when considering whether the applicant's visa should be cancelled.
83. The applicant has managed to be able to continue her relationship with her daughter and grandchildren even when they have spent extended periods in China. There is no information which would indicate that the manner and level of communication the applicant has had with her daughter and grandchildren while they have been residing in China would not be able to be continued while the applicant was in China and they were residing in Australia. Further, there is nothing to indicate that the applicant's daughter and grandchildren would not travel to China while the applicant was residing there to spend time with her.

Subsequent behaviour of the applicant concerning her obligations under Subdivision C of Division 3 of Part 2 of the Act

84. Nothing adverse is known about the applicant's behaviour concerning her obligations under the Act. The applicant submitted a Notification of Incorrect Answers advising the Department of the incorrect information she had provided in her Partner visa application. This was only after she was aware that the NSW RMS had identified her as having previously used her cousin's identity in Australia. Little weight is given in favour of the applicant for having made the disclosure of having provided false information in her Partner visa application.

Other instances of non-compliance

85. The applicant entered Australia using her cousin's passport and then used that identity to make an application for a Protection visa. She did not notify the Department at any time over the period that she was in Australia using her cousin's passport or her true identity or the circumstances of why she left China. She applied for other identity documents from NSW RMS, again using her cousin's passport and identity documents, to obtain a document which did not provide correct information as to her identity.
86. Since she was granted the Partner visa, there is no information before the Tribunal that there have been any other instances of non-compliance.

Time elapsed since non-compliance

87. The non-compliance occurred when the applicant applied for her Partner visa in August 2005. She entered Australia, after being granted a [Partner] visa, [in] February 2006. She has resided in Australia for over 13 years. The fact that she has resided in Australia for that period of time must weigh in her favour when considering whether to cancel her visa.
88. The Tribunal also takes into account that over that period the applicant has returned on multiple occasions to spend time with her parents in China.

Breaches of the law since the non-compliance

89. There is no information before the Tribunal that the applicant has otherwise breached the law in Australia or anywhere else.

Contribution to the community

90. The applicant claims that she has contributed to the community by paying tax from her wages. No documentary evidence was provided as to her income or tax paid on that income. The applicant acknowledged that she has worked as a [Occupation 2] in [Business 1] as well as working as a [Occupation 4]. No information has been provided as to whether she disclosed any income she has received working as a [Occupation 3] or [Occupation 4] to the tax Department or if she paid any tax on that income.
91. There is little other information that the applicant has contributed to the Australian community in any other way. The applicant referred to the support she has given to her daughter. It is noted that for most of the last 12 months the applicant's daughter has been residing with her children in China and therefore the applicant would have made little contribution or provided little support to her. Immediately after the birth of her first child, the applicant's daughter returned to China for a period of about five months. Again, this does not indicate any significant contribution being made by the applicant towards the support of her daughter or grandchildren. The Tribunal places little weight on this when considering whether the applicant's visa should be cancelled.

Consequence of cancellation

92. It is likely that if the applicant's visa is cancelled she will return to China and be separated from her husband and daughter and her daughter's children. If she remained in Australia she would become unlawful and is likely to be placed in detention. Any detention would be of limited duration and it is likely that the applicant would return voluntarily to China.
93. There would be limited opportunity for the applicant to apply for any visa to be able to remain in Australia or to immediately return to Australia after her return to China. If the applicant's

husband sponsored the applicant again for a Partner visa there would be delay both until the applicant would meet the criteria for the grant of that visa and also for the normal processing of that application. This would cause some distress both to the applicant and to her husband.

Consequential cancellations

94. Although it was expressed as a concern that if the applicant's visa was cancelled her daughter's visa would also be cancelled, no action has been taken to cancel the applicant's daughter's visa and there is no information which would indicate that any consequential cancellation would occur.

Breach of any international conventions

95. There is no information before the Tribunal that if the applicant were required to return to China there would be any breach of any international convention. The applicant has returned to China on numerous occasions since she was granted the Partner visa. There is no information which would indicate that she has suffered any difficulties or persecution for any reason from any person or organisation whenever she has returned to China. She remains a citizen of China.
96. The applicant is likely to be separated from her daughter and grandchildren if she is returned to China. The daughter and grandchildren have already spent extended periods in China separate from the applicant. There appears to have been no difficulty in maintaining a relationship between the applicant and her daughter and grandchildren over those periods. The applicant's daughter and her children have also been able to return to China and it is likely that if the applicant is returned to China, her daughter and grandchildren would visit her on occasions while she is living there.

Overall assessment

97. The Tribunal has considered all the circumstances of the applicant and the people who would be affected by the cancellation of the applicant's visa both individually and cumulatively. The Tribunal accepts that the applicant and her husband are in a genuine relationship and that any separation will cause significant emotional and financial difficulties for them both. Against this is the deliberate action of both the applicant and her husband in providing false information to the Department in support of the application. That false information was provided as they knew the applicant would be subject to a period of time after she returned to China in 2004 where she would not be able to make a successful Partner visa application. It was claimed they did not want to be separated from each other. The fact that both the applicant and her husband were willing to provide false information to the Department to avoid being separated for any extended period of time now means they face some consequence as a result of providing that false information.
98. Apart from her relationship with her family and friends, there is little information which would indicate that the applicant has integrated herself into Australian society to such an extent that she would not be able to return to China for an extended or permanent period.
99. The applicant brought to the attention of the Department the false information she provided in that application by filing a Notification of Incorrect Answers. This was only done, however, after the applicant had been notified by NSW RMS that a facial image comparison had identified her as having provided the different identity in 2002. The Tribunal finds the reason she notified the Department at that time was that she knew she had already been identified as having used the cousin's identity previously and she knew it was likely the Department would be advised of this information by NSW RMS.

100. The applicant claimed the provision of the false information was merely a “misunderstanding”. She claimed that she was merely following her “friend’s advice” and that she “tried to answer all questions truthfully and to the best of her ability”. The Tribunal does not accept this. As set out above, the Tribunal finds that the giving of false information was done deliberately and intentionally by the applicant to circumvent Australia’s immigration laws. The applicant did this with the cooperation and assistance of her husband. The integrity of Australia’s immigration laws is dependent upon applicants providing correct information when applying for visas. The actions of the applicant and her husband undermined this process.
101. In all the circumstances, the Tribunal is not satisfied that the reasons not to cancel the applicant’s visa outweigh the significant dishonesty of the applicant in providing the false information in respect of her Partner visa application. This is exacerbated by her failure to acknowledge her culpability in providing this false information by claiming that it was simply a “misunderstanding” that she did provide the false information.
102. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

103. The Tribunal affirms the decision to cancel the applicant’s Subclass 155 (Five Year Resident Return) visa.

Hugh Sanderson
Member

ATTACHMENT – Migration Act 1958 (extracts)

5 Interpretation

(1) In this Act, unless the contrary intention appears:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

107 Notice of incorrect applications

(1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:

- (a) giving particulars of the possible non-compliance; and
- (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:

- (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
- (ii) if the holder gives the Minister a written response within that period—when the response is given; or
- (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.